BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RALPH BECKER Claimant VS. **RALPH BECKER** Respondent AND **CIGNA** Insurance Carrier AND **KANSAS WORKERS COMPENSATION FUND**	)	Docket No. 183,845

ORDER

The Kansas Workers Compensation Fund filed an application for review requesting the Appeals Board to review an Award entered by Administrative Law Judge George R. Robertson on March 23, 1995. The Appeals Board heard oral argument by telephone conference on September 18, 1995.

APPEARANCES

Claimant appeared by his attorney, John Sherman of Ellsworth, Kansas. Respondent and its insurance carrier appeared by their attorney, John W. Mize of Salina, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Norman R. Kelly of Salina, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations entered in the March 23, 1995 Award.

ISSUES

The Administrative Law Judge found the Kansas Workers Compensation Fund (Fund) liable for all benefits and costs awarded in this matter. From that decision, the Fund requests Appeals Board review of the following issues:

(1) What is the claimant's average weekly wage?
(2) What is the nature and extent of claimant's disability?
(3) What is the liability of the Kansas Workers Compensation Fund?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, hearing the arguments and considering the briefs of the parties, the Appeals Board finds as follows:

(1) On the date of claimant's accidental injury, August 30, 1989, he was a self-employed, over-the-road truck driver. Admitted into evidence at the regular hearing was claimant's 1989 Individual Income Tax Return Form 1040. Attached to Form 1040 was claimant's Schedule C which represented the business income and expenses for claimant's trucking business for 1989. Claimant testified that the income and expenses represented on Schedule C were incurred from January 1, 1989 through August 30, 1989 the date of his accident. He testified that as a result of his injuries he did not perform the duties of a truck driver for the balance of the 1989 calendar year. The Schedule C showed the claimant had a gross income of forty-nine thousand one hundred sixty-nine dollars ($49,169.00) and expenses of fifty-nine thousand ninety-seven dollars ($59,097.00) for a net loss of nine thousand nine hundred twenty-eight dollars ($9,928.00).

The Administrative Law Judge found that the claimant's average weekly wage to be in the amount of four hundred sixty-three dollars and eighty-one cents ($463.81). He determined that even though claimant's trucking business operated at a loss in 1989, that the itemized expenses of depreciation and meals/entertainment, which totalled twenty-four thousand fifteen dollars ($24,015.00), represented wages for the purpose of calculating the claimant's average weekly wage under K.S.A. 44-511(a)(3). The Administrative Law Judge, in finding that four hundred sixty-one dollars and eighty-three cents ($461.83) was the average weekly wage for the claimant, divided the total of these two expense items by fifty-two (52), the number of the weeks in a year. The Administrative Law Judge, in making this finding, recognized that there are many disputes with regard to the calculation of the average weekly wage for a self-employed truck driver.

The claimant agrees with the Administrative Law Judge that depreciation expenses and meals/entertainment expenses are appropriate to treat as income to calculate the amount of wages claimant earned in 1989. However, the claimant contends that the appropriate number of weeks that should be used to determine the average weekly wage in this case is thirty-four and fifty-seven hundredths (34.57) weeks instead of fifty-two (52) weeks. Claimant reasons that the income and expense items included on Schedule C only represented work through August 30, 1989 and not through December 31, 1989. The Fund counters and argues that since the claimant's Schedule C shows a loss, there is no evidence that has been presented by the claimant that he received any wages for services performed for the respondent in 1989. The Fund further contends that the expense items of depreciation and meals/entertainment, contained in claimant's Scheduled C for 1989, do not represent an economic gain to the claimant and, therefore, cannot be determinative of his average weekly wage.

The Appeals Board recognizes that the calculation for determining average weekly wage for a self-employed person is unsettled when such person does not receive a regular wage or salary. However, two Kansas Court of Appeals cases involving this issue are instructive and give some guidance in determining an average weekly wage for a self-employed person. A car allowance provided to an employee by his employer was included as wages in computing an employee's average gross wage under K.S.A. 44-511(a)(3)

when it was found that such allowance was not simply a reimbursement for expenses incurred during the course of employment, but, in fact, constituted a real economic gain to the employee. See Ridgway v. Board of Ford County Comm'rs, 12 Kan. App. 2d 441, 444, 748 P.2d 891 (1987), rev. denied 242 Kan. 903 (1988). A self-employed truck driver's average weekly wage was an issue in the case of Thompson v. Harold Thompson Trucking, 12 Kan. App. 2d 449, 748 P.2d 430, (1987), rev. denied 243 Kan. 782 (1988). In that case, no personal or business income tax returns were presented, but claimant's wife, who kept the company books, testified that Thompson Trucking showed a tax loss for the year in question. She also testified that during the twenty-six (26) weeks preceding claimant's accident, five thousand six hundred twenty-six dollars and five cents ($5,626.05) worth of checks were written from the Thompson Trucking account and were itemized as owner withdraws. She testified the money was used for personal expenses such as food, clothing and home and car insurance expenses. The district court had arrived at an average weekly wage of two hundred fifteen dollars and thirty-nine cents ($215.39) by dividing the amount of the withdrawals by twenty-six (26) weeks. *Id*. at 459. This average weekly wage amount was affirmed by the Court of Appeals reasoning that "Since wage earners support their families (paying for their food, clothing and home and insurance) from their average weekly wage, the `owner withdrawals' from the Thompson Trucking Company which were used as wages could reasonably be the basis for Thompson's salary. *Id*. at 460.

Using these two Appellate Court decisions for guidance, the Appeals Board finds that the only appropriate expense category that can be utilized as wages for a calculation of the claimant's average weekly wage in this case is the meals/entertainment expense item in the amount of four thousand six hundred eighty dollars ($4,680.00). This expense item represents an amount the claimant spent for meals for himself while performing duties as a truck driver and which would have been spent even if he had not been working. Therefore, the Appeals Board finds that the meals/entertainment expense represents an economic gain to the claimant and is an expense for which wage earners normally use their wages. The depreciation expense item included in claimant's Schedule C is not an appropriate amount to be included in the claimant's wages. It is a reflection of the fact that a truck's value does diminish with time and use and, further, a truck wears out and must be replaced. Therefore, it represents strictly a business-related expense for income tax purposes and does not represent an economic gain to the claimant. There has been no evidence presented that the amount designated depreciation was used or spent in such a manner as to constitute economic gain to the claimant. Arguably, the depreciation expense could have reduced claimant's taxes, thereby increasing the amount of disposable income; however, the evidence does not show that any increase in disposable income provided economic gain to claimant or his family.

The claimant has the burden to prove his average weekly wage along with other various conditions in order to establish his right to an award of compensation. See K.S.A. 44-501(a). In the case at hand, the only evidence presented by the claimant to prove average weekly wage was the information contained in his Individual 1989 Income Tax Return. From that evidence, the Appeals Board finds that the appropriate average weekly wage for the claimant on the date of his accident is one hundred thirty-five dollars and thirty-eight cents ($135.38). This average weekly wage is determined by taking the amount claimant spent on meals/entertainment of four thousand six hundred eighty dollars ($4,680.00) for the thirty-four and fifty-seven hundredths (34.57) week period the claimant worked between January 1, 1989 and August 30, 1989.

(2) The Fund does not challenge the fact that claimant sustained an accidental injury to his left hip when he fell on August 30, 1989. However, the Fund does deny that the

accidental injury resulted in any permanent disability or need for medical treatment other than the first two or three (2-3) months of conservative medical treatment. The Fund argues that any medical treatment after this first two or three (2-3) month period is a result of claimant's preexisting Legg-Perthes disease and degenerative arthritis. Additionally, the Fund asserts that the permanent functional impairment that is presently attributed to claimant's left hip is due only to claimant's preexisting condition and is not the result of the injury claimant sustained on August 30, 1989.

The Administrative Law Judge found that the medical evidence contained in the record overwhelmingly proved that claimant's preexisting condition of Legg-Perthes disease was aggravated by his fall. The Administrative Law Judge cited the case of Harris v. Cessna Aircraft Co., 9 Kan. App. 2d 334, 678 P.2d 178 (1984), as holding that a worker is entitled to permanent disability compensation if the accident aggravates, accelerates or intensifies his preexisting condition. Alan L. Kruckemyer, M.D., who performed claimant's total left hip replacement, opined that claimant's fall aggravated his preexisting condition. Roger W. Hood, M.D., who subsequently performed left hip revision surgery, opined that claimant's preexisting Legg-Perthes disease set claimant up to have a problem with this type of injury.

The Administrative Law Judge went on to find that as a result of this permanent aggravation, the claimant was entitled to a permanent partial general disability based on work disability. The Appeals Board affirms the Administrative Law Judge's finding that claimant's fall permanently aggravated and accelerated claimant's preexisting left hip condition resulting in an entitlement to work disability. However, the Appeals Board finds that the Administrative Law Judge's work disability finding of sixty-five percent (65%) should be modified to reflect the average weekly wage of one hundred thirty-five dollars and thirty-eight cents ($135.38) as found by the Appeals Board instead of the four hundred sixty-one dollars and eighty-three cents ($461.83) found by the Administrative Law Judge.

The Appeals Board also finds that the appropriate measurement of claimant's loss of ability to perform work in the open labor market was the opinion of Monty Longacre, vocational expert, whose uncontradicted testimony was presented by the claimant. Mr. Longacre opined, based on Dr. Hood's restrictions, that the claimant had lost seventy-nine percent (79%) of his ability to perform work in the open labor market. Mr. Longacre also opined that claimant retained the ability to earn one hundred eighty dollars ($180.00) per week in a sedentary job. Therefore, when claimant's pre-injury average weekly wage of one hundred thirty-five dollars and thirty-eight cents ($135.38) is compared to Mr. Longacre's opinion of one hundred eighty dollars ($180.00) per week post-injury, the claimant has no loss of ability to earn a comparable wage in the open labor market as a result of his accidental injury. Accordingly, the Appeals Board finds that both claimant's loss of his ability to perform work in the open labor market in the amount of seventy-nine percent (79%) should be weighed equally with his zero percent (0%) loss of ability to earn comparable wage entitling claimant to a forty-percent (40%) work disability. See Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

(3) The Appeals Board affirms the Administrative Law Judge's finding that the Fund is liable for all compensation benefits and costs paid in this matter and adopts the Administrative Law Judge's analysis and reasoning as its own in regard to this issue.

All other findings and orders of the Administrative Law Judge as set forth in his Award dated March 23, 1995, are affirmed by the Appeals Board and are incorporated and adopted in this Order by the Appeals Board as if specifically expressed herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson dated May 23, 1995, should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Ralph Becker, and against the respondent, Ralph Becker, and its insurance carrier, CIGNA, for an accidental injury which occurred on August 30, 1989, and based upon an average weekly wage of $135.38.

Claimant is entitled to 178 weeks of temporary total disability compensation at the rate of $90.26 per week or $16,066.28, followed by 237 weeks of permanent partial general disability at the rate of $36.10 per week or $8,555.70 for a 40% permanent partial general work disability, making a total award of $24,621.98.

As of February 23, 1996, there is due and owing claimant 178 weeks of temporary total disability compensation at the rate of $90.26 per week or $16,066.28, followed by 160.43 weeks of permanent partial disability compensation at the rate of $36.10 per week in the sum of $5,791.52, for a total of $21,857.80 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $2,764.18 is to be paid for 76.57 weeks at the rate of $36.10 per week, until fully paid or further order of the Director.

Further award is made that claimant is entitled to medical expenses, and any unauthorized medical expenses up to the statutory maximum, if any.

Future medical will be considered upon proper application.

The Court finds attorney fee retainer is reasonable and approves such fee arrangement.

Therefore, pursuant to K.S.A. 44-536, a lien is placed against the award in the amount of 25% in favor of Mr. John Sherman.

The Kansas Workers Compensation Fund is ordered to pay all compensation benefits awarded in the case.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the Kansas Workers Compensation Fund and such are directed to pay costs of the transcripts as follows:

Jay E. Suddreth & Associates Deposition of Dr. Roger Hood Dated September 12, 1994	$258.35
Owens, Brake & Associates Deposition of Dr. Tyrone Artz Dated March 22, 1994	$197.76
Regular Hearing Transcript Dated May 11, 1994	$456.70

Deposition of Dr. David McQueen Dated June 28, 1994	$162.36
Deposition of Dr. Alan Kruckemyer Dated July 1, 1994	$377.70
TOTAL	$1194.52

Owens, Brake, Cowan & Associates

Deposition of Monty Longacre Dated January 4, 1995	$330.80

IT IS SO ORDERED.

Dated this ____ day of February 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John Shermann, Ellsworth, Kansas
John W. Mize, Salina, Kansas
Norman R. Kelly, Salina, Kansas
George R. Robertson, Administrative Law Judge
Philip S. Harness, Director